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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 136

LUDWIG KOENIGER,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

EDWARD V. BRODERICK,
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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ludwig Koeniger, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of conviction rendered against him in a criminal case in the United States District Court for the Eastern District of New York.

Jurisdiction of This Court

The judgment of affirmance of the United States Circuit Court of Appeals for the Second Circuit was rendered on April 27th, 1945 and the order for mandate, which is

the decree sought to be reviewed, is dated May 14th, 1945 (R. 125). This petition is filed within thirty days from the date thereof as required by Rule 11 of the Rules of Practice and Procedure in criminal cases after plea of guilty, verdict or finding of guilt, established under authority of Title 18, U. S. C. A., Sections 687, 688.

The jurisdiction of this Court is conferred by 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), U. S. Code, Title 28, Section 347.

Opinions Below

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals has not yet been officially recorded and is printed in the record at page 124.

Statement

The President, under the powers granted by Title 50, U. S. C. A., Sections 21, *et seq.*, issued a proclamation on January 14, 1942 (3 CFR, Cum. Supp., Proc. 2537), requiring all enemy aliens to register in accordance with detailed regulations of the Attorney General of the United States (January 22, 1942, 28 CFR, Cum. Supp., 30.51-30.63). The petitioner, registered under the Alien Registration Act of 1940 as a German subject, filed an application, in February, 1942, for a Certificate of Identification as an Enemy Alien (R. 103-106). In response to a question on the face of the application blank directing the applicant to, "Name the clubs, organizations and societies of which you have been a member or with which you have been affiliated at any time during the past 5 years," he stated, "Krug's Credit Union, Jamaica, New York" (R. 105). On the basis of this answer, he was indicted for having made a false statement, in violation of Title 50, U. S. C. A., Section 80, because he

made no disclosure of the fact that he filed an application in 1940 with the German Consulate for membership in the Nationalsocialistische Deutsche Arbeiterpartei (National Socialist German Workers Party), commonly known as the Nazi Party.

The record shows that petitioner never took an oath or was inducted as a member of the Nazi Party, and his status within that organization was that of an "anwaerter," a person recognized by the rules of the party as an "applicant" or "probationer" (R. 9, 18, 31-2). He was tried and convicted by a jury in the United States District Court for the Eastern District and sentenced to a term of fifteen months' imprisonment. His conviction was affirmed on appeal to the Circuit Court of Appeals and he has been released on bail pending appeal to this Court.

Questions Presented

1. Is the presentation of a false claim or statement, in violation of the rules and regulations governing the conduct of enemy aliens promulgated by the Attorney General of the United States, pursuant to the authority of a Presidential Proclamation issued under Title 50, U. S. C. A., Sections 21, *et seq.*, punishable exclusively by the penalties provided by that title, or may the penal provisions of Title 18, U. S. C. A., Section 80, be invoked?

2. Does the failure and neglect of a person to state that he is an applicant for membership in the Nazi Party in response to a question on an application for a Certificate of Identification as an enemy alien requiring him to, "Name the clubs, organizations and societies of which you have been a member or with which you have been affiliated at any time during the past 5 years," constitute the presentation of a false claim or statement within the meaning of Title 18, U. S. C. A., Section 80?

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the judgment of conviction.

2. In holding that a violation of the rules and regulations governing the conduct of enemy aliens is punishable under the provisions of Title 18, U. S. C. A., Section 80.

3. In holding that the answer made by the petitioner on his application for a Certificate of Identification constituted a crime within the meaning of Title 18, U. S. C. A., Section 80.

Reasons for the Allowance of the Writ

The question in this case is one of Federal law which has not been, but should be, settled by this Court. It is a matter of great importance not only to the petitioner, but to the thousands of aliens registered under the Alien Registration Acts, who may be subject to criminal prosecution for wilful or unintentional violation of the rules and regulations promulgated for the control of their conduct.

The question of whether a violation of these rules and regulations is to be prosecuted and punished under the provisions of Section 23, Title 50, U. S. C. A., which apply exclusively to enemy aliens, or whether it is proper to base a prosecution under the provisions of Title 18, U. S. C. A., Section 80, which are applicable to all persons who wilfully make false claims in any matter within the jurisdiction of any department or agency of the United States, presents an issue which should be determined and settled by this Court.

The decision of the Circuit Court of Appeals holding that the prosecution, conviction and punishment of petitioner under Title 18, U. S. C. A., Section 80, is proper, is an apparent departure from the Acts of Congress which define and prescribe the penalties for violations of the Alien Registration Acts. Punishment of violators under Title 18 is greater than punishment under Title 50, and under the established facts there is serious doubt whether any crime has been committed within the meaning of the crimes defined in Title 18, U. S. C. A., Section 80.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain, to be named therein, a full and complete transcript of the record and of all proceedings of the said Circuit Court of Appeals in this case; and that the judgment and order of the said Circuit Court of Appeals be reversed and that the petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

EDWARD V. BRODERICK,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

The attention of the Court is respectfully directed to the petition containing a statement of the case (Petition, *ante*, pp. 2 and 3), the opinion of the Circuit Court (Petition, *ante*, p. 2) and the specification of errors now urged (Petition, *ante*, p. 4).

Statutes Involved

Title 18, U. S. C. A., Section 80, under which the defendant was indicted and penalized, provides as follows:

> "§ 80. (Criminal Code, Section 35(A).) Presenting false claims.
>
> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 50, U. S. C. A., Section 23, applicable to enemy aliens, provides as follows:

> "§ 23. Jurisdiction of United States Courts and judges.
>
> "After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed."

ARGUMENT

I

A violation of the rules and regulations governing the conduct of enemy aliens should be prosecuted and punished under the provisions of Title 50, Section 23.

Under the Act of June 28, 1940, Section 41, all aliens are required to register and be fingerprinted (Title 8, U. S. C. A., Sections 451-460). Penalties for failure to register are prescribed by Section 457, and subdivision (c) provides that any alien filing an application for registra-

tion containing false statements is subject, upon conviction, to a fine in the sum of $1,000.00, imprisonment for not more than six months and possible deportation. Presidential Proclamation No. 2537, issued January 14th, 1942 (3 CFR, Cum. Supp.), under Title 50, U. S. C. A., Section 21, authorized the Attorney General of the United States to establish rules and regulations for the conduct of all enemy aliens.

Section 23 of Title 50, U. S. C. A., vests the criminal courts of the United States with jurisdiction over complaints against alien enemies considered dangerous to public safety and authorizes the apprehension, detention and imprisonment of those violating the rules and regulations established by Presidential Proclamation. No specific reference is made in that section with respect to the presentation of a false or fraudulent claim or statement by a registrant under the Act, but the regulations promulgated by the Attorney General of the United States on January 22, 1942 (28 C. F. R., Cum. Supp., 30.63) provide that, "Any alien of enemy nationality herein who fails to comply with the regulations in this part or any other regulations governing the conduct of aliens of enemy nationalities, is subject to apprehension, detention and internment for the duration of the war."

It seems clear from the foregoing enactments and the proclamations, rules and regulations promulgated under the authority thereof, that the specific provisions for the punishment of violators of the Registration Acts was exclusively intended to embrace all violations committed thereunder. In view of that legislative basis petitioner respectfully suggests that the prosecution of the petitioner under the general provisions of Title 18, U. S. C. A., Section 80, was unauthorized, improper and contrary to the Congressional scheme for the punishment of violations of the Enemy Alien Registration Acts. A mere reading of these sections discloses the contrariety of the punishment provided by each.

The question of which statute should apply to the petitioner's case is not, therefore, merely an academic question, but presents a real issue of importance and merit.

II

Petitioner's statement on the application for a certificate of identification does not constitute a crime within the meaning of Title 18, U. S. C. A., Section 80.

Section 80, Title 18, U. S. C. A., condemns the presentation of a false or fraudulent statement, affidavit or deposition in any matter within the jurisdiction of any department or agency of the United States. Proof of a violation of that statute can only be established by evidence of a false, deceitful or fraudulent statement made with knowledge of its falsity and with intent to deceive. The record in this case will show that the petitioner has not presented any false or fraudulent claims with knowledge of its falsity, and the violation, if any, is attributable to the peculiar and vague nature of the question to which his response was given.

The question which requires of all enemy aliens to, "Name the clubs, organizations and societies of which you have been a member or with which you have been affiliated at any time during the past 5 years," is vague, ambiguous and, reasonably interpreted, offers no conclusive suggestion that applicants furnish information concerning membership or affiliation with any political organizations. The failure on the part of petitioner to make a disclosure about his remote and abandoned effort to join the Nazi Party does not justify the conclusion that this constituted an effort on his part to evade legal requirements. His action in that connection was indiscreet perhaps, but furnishes no basis for criminal prosecution, especially when it is considered that the petitioner is an alien not readily familiar with the English language.

Petitioner was not a member of the Nazi Party or an affiliate, but his status was that of an applicant or probationary member. He never took an oath or was officially inducted as a member, and the lack of any knowledge that he was a member in good standing, was sufficient justification for the belief that the question did not apply to him. There is no basis to support the charge that his inadvertence or bad judgment constitutes a crime within the meaning of Title 18, U. S. C. A., Section 80.

CONCLUSION

It is respectfully submitted that the decision below was in error and should be reviewed by this Court. Accordingly, the writ prayed for should issue.

Respectfully submitted,

EDWARD V. BRODERICK,
Counsel for Petitioner.

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In the Supreme Court of the United States

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No. 136

LUDWIG KOENIGER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 124) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 14, 1945 (R. 125). The petition for a writ of certiorari was filed June 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a false statement in an application for a certificate of identification by an enemy alien constitutes a violation of Section 35 (A) of the Criminal Code.

2. Whether petitioner's concealment of his status as a probationary member of the Nazi Party in response to a question requiring him to name the organizations of which he had been a member or with which he had been affiliated during the preceding five years, constituted a false statement within the meaning of Section 35 (A).

STATUTES AND REGULATIONS INVOLVED

Section 35 (A) of the Criminal Code, as amended (18 U. S. C. 80), provides in pertinent part as follows:

> * * * whoever shall * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

R. S. 4067, as amended by the Act of April 16, 1918, c. 55, 40 Stat. 531 (50 U. S. C. 21), provides in part as follows:

> Whenever there is a declared war between the United States and any foreign nation or government * * * and the

President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted * * * and to establish any other regulations which are found necessary in the premises and for the public safety.

R. S. 4069 (50 U. S. C. 23) provides:

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or

> justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed.

Presidential Proclamation 2537, issued January 14, 1942 (3 C. F. R. Cum. Supp., p. 287), provided in part:

> All alien enemies within the continental United States * * * are hereby required, at such times and places and in such manner as may be fixed by the Attorney General of the United States, to apply for and acquire certificates of identification * * *.

The regulations of the Attorney General issued pursuant to this proclamation on October 19, 1942 (7 F. R. 1477, 8455; 28 C. F. R. Cum. Supp. 30.51 ff.) provide in pertinent part:

> 30.51. * * * persons in the United States * * * required to apply for certificates of identification * * * are as follows:
>
> (a) All aliens who are of the age of 14 years or upward and who are German or Japanese citizens or subjects.
>
> * * * * *

30.56. (n) The following information shall be furnished by each applicant:

* * * * *

(14) The applicant shall list the clubs, organizations, or societies of which he has been a member or officer, or with which he has been affiliated, at any time during the period of 5 years preceding the date of such application either in the United States or abroad. In the event that any such listed membership or affiliation has ceased prior to the date of the application, the applicant shall give the approximate date thereof. If the applicant spent any part of said 5-year period outside the United States, he shall include a statement of his foreign political party or national organization affiliation during such portion of said 5-year period as he spent outside the United States.

* * * * *

30.63. (a) Any alien of enemy nationality herein defined who fails to comply with the regulations in this part or any other regulations governing the conduct of aliens of enemy nationalities, is subject to apprehension, detention, and internment for the duration of the war.

STATEMENT

An indictment in one count was returned against petitioner in the United States District Court for the Eastern District of New York, charging that on February 26, 1942, in violation of Section 35 (A) of the Criminal Code, he made a false

statement of a material fact in a matter within the jurisdiction of the United States Department of Justice in that, in an application for a certificate of identification required of enemy aliens (see *supra,* pp. 2–4), he had stated that he had belonged to no clubs, organizations, or societies other than a credit union during the five-year period preceding the date of the application, whereas in fact he had been a member of and affiliated with the Nazi Party during such period (R. 5–6).

The Government proved that petitioner had made the statement in his application as alleged in the indictment (Gov. Ex. 12, R. 54, 103–106). The evidence supporting the charge that such statement was false, and that petitioner had in fact been a member of or affiliated with the Nazi Party during the five years preceding the application, may be summarized as follows:

The National Socialist German Workers Party, commonly known as the Nazi Party or the N. S. D. A. P., had a branch in the United States under the leadership of Dr. Draeger, a member of the German Consulate in New York (R. 8–17). The party recognized two classes of members—full members who had been in good standing for approximately two years, and "anwaerters," i. e., applicants, or probationary members (R. 9, 34, 98). An applicant for membership signed a form in which he promised unconditional loyalty to the "Fuehrer," agreed to serve the party with all his

strength, and assumed the obligation to pay a fixed initiation fee and monthly dues (Gov. Ex. 1, R. 10, 61, 115). The applicant paid an initiation fee of $1.50, $1.00 for an identification card, $3.00 representing three months' dues in advance, and a propaganda fee, usually of $10 but sometimes of a lesser amount (R. 13–14, 16). Both applicants and full members paid the same dues (R. 10), and the names of both applicants and full members appeared on a list of party members which had been drawn up in the office of the consulate before all other records of party membership "disappeared" in May 1940 (R. 17–18, 24). The names of persons who applied for membership after 1940 were added to that list (R. 20–21, 24–26). Petitioner's name was among the latter group (Gov. Ex. 6; R. 61, 116–117).

In two statements given by petitioner to agents of the Federal Bureau of Investigation, petitioner said that he had applied for membership in the Nazi Party in the latter part of 1940 or the early part of 1941 and had paid a fee of approximately $12.50 (R. 97, 99); that at that time he was told that he would be on probation for two years and thereafter would become a regular member (R. 98); and that he did not pay any further dues because the consulate was closed (R. 97). In his second statement, petitioner said that Vogel, secretary to Draeger, the head of the Nazi Party in the United States (R. 8, 14–15), told him "not

to admit to anyone that I was a member of the NSDAP" (R. 98) and that "Accordingly I did not state I was member of the NSDAP in my 1942 Alien Registration form. I knew that this was wrong" (R. 98).

Prior to petitioner's application for membership in the party, he had been a sympathizer of the German-American Bund (R. 75, 98) and had attended functions of the Nazi Party (R. 76, 100–102). He had obtained forms for application for membership in the party in 1938 but had decided not to use them at that time (R. 99).

Petitioner was convicted (R. 96), and he was sentenced to imprisonment for fifteen months (R. 4, 107–108). On appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 125).

ARGUMENT

1. Petitioner's contention that Section 35 (A) of the Criminal Code is not applicable to false statements made in an application for a certificate of identification because Section 4069 of the Revised Statutes, 50 U. S. C. 23 (*supra,* pp. 3–4), confers jurisdiction upon the federal district courts to order the deportation or detention of an alien who violates regulations issued by the President pursuant to R. S. 4067, 50 U. S. C. 21 (Pet. 3, 4–5, 8–9), was correctly answered by the court below in the companion case of *United States* v. *Heine,* decided April 27, 1945, certiorari denied

June 18, 1945, No. 1331, October Term, 1944. As the court there pointed out, neither R. S. 4069 nor Section 30.63 of the Regulations issued by the Attorney General (see *supra*, p. 5), which merely reiterates the provisions of the statute that any alien enemy who violates the regulations shall be subject to detention and internment, makes specific provision for the punishment of false statements by an alien in respect of any matter covered by the regulations issued pursuant to R. S. 4067. Neither does Section 36 (c) of the Alien Registration Act of June 28, 1940, 54 Stat. 675 (8 U. S. C. 457), providing a penalty for false statements in an application for registration under that act, cover false statements in an application for a certificate of identification required of enemy aliens in war time pursuant to the Presidential proclamation issued under the authority of R. S. 4067. Since the application for a certificate of identification was clearly a matter within the jurisdiction of an agency of the United States, and since no other specific statute punishes the making of a false statement in such an application, petitioner was properly charged and punished under Section 35 (A) of the Criminal Code, the general statute covering false statements in any matter within the jurisdiction of any agency of the United States. *United States* v. *Gilliland*, 312 U. S. 86, 95–96; *United States* v. *Meyer*, 140 F. 2d 652, 655 (C. C. A. 2); *Fuller* v. *United States*, 110

F. 2d 815, 817 (C. C. A. 9), certiorari denied, 311 U. S. 669.

2. There is no merit in petitioner's contention (Pet. 3, 5, 10–11) that as an "anwaerter" he was not a member of or affiliated with the Nazi Party and, hence, that the evidence failed to establish a false statement within the purview of Section 35 (A) of the Criminal Code. Petitioner, who paid dues to the Nazi Party and promised allegiance to the fuehrer and party, was, if not actually a member, clearly affiliated with the party in the sense that affiliation was defined by this Court in *Bridges* v. *Wixon,* No. 788, October Term, 1944, decided June 18, 1945; his acts had "that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization * * *." See also *United States* v. *Dawe,* decided April 27, 1945 (C. C. A. 2. In view of petitioner's admission that his failure to reveal his membership in the party was a knowingly wrongful act performed at the suggestion of Vogel, secretary to the head of the party (*supra,* pp. 7–8), the evidence fully supports the conclusion that petitioner was aware that the Government was seeking to be apprised of his affiliation with the party, and that he wilfully concealed such fact.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or question of general

importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.
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JULY 1945.

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